No. 1593.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JAMES W. FREEMAN,
U. S. Attorney, District of Montana.
S. C. FORD,
Assistant U. S. Attorney.

Timely service of this Brief is hereby admitted, this .... day of February, 1909.

.....

Attorneys for Plaintiff in Error.

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I.

HISTORY OF THE CASE.

The plaintiff in error, who will hereinafter be called "the defendant", was indicted by the Grand Jury of the District Court of the District of Montana on the 20th day of December, 1907. The charging part of the indictment reads as follows:

"Did wrongfully and unlawfully, maintain and control, and cause to be maintained and controlled by him, the said Emil Bircher, an inclosure of the said lands consisting of a fence of posts and wires, which said fence, then and there, inclosed all of the said tract of land comprising an area of approximately nineteen hundred and twenty acres of land, said lands so inclosed as aforesaid being public lands of the United States, and he the said Emil Bircher,

at the time of so maintaining and controlling said fence and inclosure as aforesaid, had no claim or color of title made or acquired in good faith, or an asserted right to said lands by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States to said lands, or any part or parcel * * *"

Transcript of Record, Page 3.

On January 25th, A. D. 1908, the defendant entered his plea of not guilty to the indictment.

Transcript of Record, page 6.

Thereafter, issues thus framed were tried by jury, and on the 20th day of March, A. D. 1908, said jury returned a verdict of guilty of the crime charged in the indictment.

Transcript of Record, page 7.

Thereafter on the 21st day of March, 1908, and before Judgment, defendant moved in arrest of Judgment upon the ground that the indictment did not state facts sufficient to constitute a public offense.

Transcript of Record, page 7.

This motion was denied March 21st, 1908.

Transcript of Record, page 8.

On the 26th day of March, 1908, defendant filed a Bill of Exceptions to the order of the Court denying the motion in arrest of judgment, which was allowed and filed.

Transcript of Record, pages 12-15.

On March 21st, 1908, judgment was pronounced and en-

tered against the defendant, imposing a fine of $250.00, and sentencing him to confinement in the Lewis & Clark County Jail for a term of twenty days.

Transcript of Record, pages 9-11.

Thereafter, on the 21st day of March, 1908, defendant filed his assignment of error.

Transcript of Record, pages 16-17.

And with the assignment of error filed his petition for a writ of error to this Court, (Transcript of Record, pages 18-19), which was allowed, (Transcript of Record, pages 19-20), and a bond given as required in the order, (Transcript of Record, pages 21-22).

The allegations or assignment of error, and points raised by counsel for defendant will be considered.

ARGUMENT.

THE MOTION IN ARREST OF JUDGMENT WAS PROPERLY OVERRULED.

This Indictment was found under the Act of February 25th, 1885, which is as follows:

"Section 1. That all inclosures of any public lands in any State or Territory of the United States, heretofore or thereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure

had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosures, is likewise declared unlawful, and hereby prohibited."

"Section 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offense."

Judge Hunt, in his opinion overruling the Motion in arrest of Judgment, in the Court below, said:

"The general views of the statute must have prevailed because of the language which has suggested them, and because the intention of Congress in using the words it did throughout the Act and in the title was obviously to prevent occupancy of the public domain. It may be that there has been no case which turned for decision solely upon the precise point presented by the motion filed in

this case; but we find several opinions by Judges as to what the Act in effect declares, from which it is reasonable to infer that close study and construction of the latter, as well as the spirit of the Act, must have been had as predicates for the opinions delivered."

And again,

"But the law goes farther, and in order to make the underlying purpose of the statute as effective as possible, in the policy of prohibiting any inclosure of any public lands, except by those who contemplate entry, it also forbids maintaining any inclosure by one who has no claim with a view to entry, at the time the inclosure is to be kept. Such as the inclosure forbidden to be kept, and such is the kind included within the terms and obvious intent of the law. That is to say, the words 'such inclosure,' as used in the second clause of section one, refer to an inclosure of public lands, to any of which land included within the inclosure the maintainer has no claim of title when he is keeping up the inclosure. They are to be read with relation to the word 'maintenance', signifying continuing acts. The words in the first clause specifying the time when, if maker of the inclosure had no title, he is liable under the law qualify the definitions of the offense of the making of the inclosure, and are to be construed with relation to the verb 'made', which in turn but means passed action which has caused the inclosure to exist. If the language had meant that those only who had no claim when the inclosure was made, or the fence was constructed, were liable as maintainers, Congress could easily and perfectly

clearly have restricted the meaning of the word 'maintenance' by inserting the words 'or maintained' after the verb 'made' in the first clause, so that the words of prohibition would have read, 'all inclosures of public lands heretofore or to be hereafter made, maintained, erected etc.' But they do not, and we must assume that the legislation was deliberately had. The distinct use of the noun 'maintenance' in the second clause leads, therefore, to the belief that a different but continuing offense was defined. From this, it should naturally follow that the inclosure described as one maintained must be regarded by relation to what constitutes maintenance as forbidden, independently of the intent to enter the land at the time when the inclosure was made."

"The whole statute is one framed with a view to stop the occupation of the public lands, and to meet every situation that, it would seem, could possibly arise to annoy or harrass or impede the bona fide homeseeker or claimant under the land law".

To protect the public lands in every possible emergency Congress, by section five of this Act provides the following:

"That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ such civil or military force as may be necessary for that purpose."

In execution of this authority, President Cleveland, on

August 7th, 1885, issued a proclamation with the following preamble:

"Whereas, public policy demands that the public domain shall be reserved for the occupancy of actual settlers in good faith, and that our people who seek homes upon such domain shall in no wise be prevented by any wrongful interference from the safe and free entry thereon to which they may be entitled."

The substance of the proclamation may be stated in these words: " * * * which declared to be unlawful all inclosures of any public lands in any State or Territory, to any of which land included within said inclosure the person making or controlling such inclosure, had no claim or color of title made or acquired in good faith, or any asserted right thereto * * * with a view to entry thereof at the proper land office; Do hereby order and direct that any and every unlawful inclosure of the public lands * * * be immediately removed."

In Camfield vs. United States, 66 Fed. on pp. 103 and 104, the Circuit Court of Appeals, speaking through Judge Thayer said:

"Section 1, of the Act of February 25, 1885, supra, declared, *in effect,* that it should thereafter be deemed unlawful for any person, association, or corporation to make or maintain an inclosure which embraced within its limits any public land of the United States, to which the person making *or maintaining* the inclosure had no claim or color of title, and to which he asserted no right under a claim

made in good faith, with a view to entry thereof at the proper land office."

In Krause vs. U. S., 147 Fed. on p. 445, the same Circuit Court of Appeals, speaking through Judge Phillips, held that an indictment charging the maintaining of an inclosure of public lands, the person, "so maintaining and controlling said fence and inclosure as aforesaid, *then and there* having no claim or color of title to any of said land" * * * "Clearly enough charges the offense of maintaining and controlling an inclosure of public lands within *the prohibition of the statute.*"

In Carroll vs. U. S., 154 Fed. 425, the defendant was chagred in the second count, in the identical language of the indictment in the case at bar, with the *maintaining* an unlawful enclosure of public lands, and was convicted upon that count, the Circuit Court of Appeals of this Circuit affirmed the judgment, saying:

"But it must be apparent that the plaintiff in error might be guilty of erecting an unlawful enclosure of public lands as charged in the first count, and yet might not be guilty of maintaining it, and it is equally clear that he might not be guilty of erecting an inclosure and yet be chargeable with maintaining and controlling it." p. 428.

A case in point upon the first proposition suggested by the Court of Appeals is U. S. v. Elliott, 74 Fed. 92, in which the erection and construction of the enclosure was illegal and within the prohibition of the statute, but *the maintenance* of the same enclosure was not. Such a situation would be impossible if the defendant's counsel's con-

tention as to the proper construction of the statute were correct, because under the construction contended for by them, the conditions *existing at the time of the erection of the fence* would govern the case.

II.

Should these decisions, deliberately made by learned courts, be ignored and overruled on the mere suggestion that the identical question presented here was not raised there? It certainly will and must be assumed that the courts referred to were cognizant of the terms of the statute, familiar with its provisions, and fully understood their import, meaning, and effect. A careful examination of the law will show that the rulings made by these courts are entirely consistent with its provisions, and that no other construction would have been justified.

The first part or clause of Section 1 of the Act provides that:

"All inclosures of public land, made, *erected* or *constructed,* to any of which land the person making or controlling the inclosure had no claim or color of title, at the time any such inclosure was or shall be MADE, are hereby declared unlawful."

The thing denounced is the *making,* erecting or constructing of the enclosure. These various terms were evidently not used as synonymous or identical in meaning. Clearly, however, the *making,* the *erecting,* and the *con-*

structing of an enclosure, or either, is declared to be unlawful.

The statute then proceeds as follows:

"And the *maintenance,* erection, construction or control of any such enclosure is hereby forbidden and prohibited."

It will be perceived that the terms *erection* and *construction* are repeated in the second clause, but the term *"make"* is not. The term "maintenance" is used instead. But, as was said in Moorhead vs. Railroad Company, 17 Ohio, 340, 353:

"To build or construct a railroad is one thing, to *maintain* the structure after it is erected or built is another."

And, again, as stated in Smith v. Grayson County, 18 Tex. Civ. App. 153; 44 S. W., 921, 923:

"Maintenance", is used in Const. Art. 8, Sec. 9, providing that the Legislature may pass local laws for the maintenance of public roads, is not limited in its meaning to the repair and RECONSTRUCTION of roads already constructed, but has reference to maintaining a system of public roads and highways, and would authorize the passage of a statute creating a road system, or of any laws necessary to provide and keep up a system of highways. *The term includes the establishment of a highway."*

So, likewise, in Rhodes vs. Mummery, 48 Ind. 216, it was held that a statute providing that partition fences "shall be *maintained* throughout the year," equally by both parties: "is not limited to repairs simply, but applies as well to the *rebuilding of a fence* destroyed by fire."

The term "maintain" or "maintenance", is not a term

of fixed or inflexible meaning, but its import and significance depends upon the subject matter in connection with which it is used. This will become at once apparent in examining the different meanings given to the term in the great variety of cases collated in 19 Ency. of Law (2nd Ed.) on pp. 609-612. As has been seen the term "made", used in the first clause of the statute, is not again used in the second clause of the Act, but the terms "maintenance" is used in the place of it, whereas the term "erect and construct", also used in the first clause, are repeated in the second. The *erecting* or *constructing* of a fence signify and import the process and manner and means of the making of an inclosure, but the inclosure is not "MADE" until completed. To inclose means "to surround, to shut in, to confine on all sides", 22 Cyc. p. 62, and an inclosure of land, is a tract of land shut in and confined on all sides. It is a thing finished and complete, and, quoting the language of the statute, "the time any such inclosure was or shall be *made*" is the time when the inclosure is a complete thing and an accomplished fact. As was said in Savings & Loan Co. vs. Miller (Tenn.) 47 S. W. 17, 24, the term " 'Made' contemplates the completion of the contract, so that it is not made while anything yet remains to be done to give it legal efficacy."

Of course, it is plain that, in as much as the terms "erection and construction" are used in the second clause as well as in the first, but the term "make" or "making" is deliberately eliminated, and the term "maintenance" substituted, such change of phraseology was not accidental.

As already pointed out the term "maintain" or "maintenance" has been and should be interpreted according to the subject matter in connection with which it is used. To maintain a railroad, for instance, either in making repairs, or in reconstructing a part thereof, which may have been destroyed, is not the "making" of the railroad, nor is the maintenance of a house or building by repairing or replacing a part thereof, a "making" of the house or building. The maintenance by repairing of a ditch, out of repair to such an extent that it cannot be successfully used is not the "making" of the ditch, nor is the maintenance of a fence, the *making of the enclosure.* The inclosure ceases to be an inclosure, just as soon as a part of the barrier or obstruction surrounding the tract of land, is broken down, removed, or gets out of repair to such an extent that it fails to prevent access to the land within. So that, as an inclosure ceases to exist whenever the fences constituting the inclosure fail to serve the purpose for which they were originally erected and constructed, that is to say, "to shut in" and "to confine on all sides", the repairing or replacing of such fences to accomplish that fact is a *making of an enclosure.* Hence, in the light of the cases and authorities cited, to the effect that the term "maintenance" means to repair and to reconstruct, the conclusion is unavoidable that the term "maintenance" as used in the second clause of the Act to the exclusion of the term "make" found in the first, implies and includes the term "making", and for that reason was omitted from the second clause of Section 1 of the Act in question.

III.

We have shown the construction of the Act as actually made by the Appellate Courts, and we have likewise shown that such construction is entirely consistent with the language of the statute in question. It seems to us that, from what has been said, there is nothing left upon which to support counsel's contention with respect to the proper construction of the Act. But let us assume, for the purpose of argument, that all doubt has not been dispelled, what other sources of inquiry are left open to us to determine the meaning of the language used? The Supreme Court of the United States in U. S. vs. Fisher, 2 Crouch on p. 386, gives the answer and points the way, as follows:

> "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, *it seizes* everything from which aid can be derived; and in such case the *title* claims a degree of notice, and will have its due share of consideration."

And so the rule has been crystallized into this form:

> "In construing a statute, every part is to be considered, including the titles."
>
> Rose's Notes to U. S. vs. Fisher, and cases cited.

The title to the Act in question in this case is:

> "An Act to prevent unlawful occupancy of public lands."

Now, the Government, in the language of Judge Brewer in U. S. v. Cleveland and Colorado Cattle Co., 33 Fed., on p. 330,

"has not simply the right of a property owner in respect to these lands; it has all the powers of sovereignty."

And as said by the same learned Judge in U. S. v. Brighton Ranch Co., 26 Fed. on p. 219:

"Any encroachment upon the public domain," is an unlawful invasion of the Government's rights and may be restrained and ended by appropriate action.

To prevent such encroachments upon the public domain was the avowed purpose of the Act of February 25, 1885, and that the maintenance of an enclosure of such lands to which the person maintaining such enclosure had, at the time of maintaining the same, no claim or color of title is, as said by the Circuit Court of Appeals of the Eighth Circuit in the Krause case:

"Clearly enough within the prohibition of the statute."

If the conditions existing at the time of the original construction of the fences were exclusive and de tennin tive then, as already pointed out, no such situation as had developed in U. S. v. Elliott, supra, decided by Judge Marshall, would avail as a defense. But the startling and absurd result of such a construction would still more glaringly appear in a case where, for instance, a large number of persons should file on 320 acres each under the desert land law, and after making the initial payment of twenty-five cents per acre, proceed to surround the entire tract with a fence. The requirements of the law as to building ditches and reclamation, are, however, not complied with at all. The first annual proof is not made, nor is any

proof made at any time in compliance with the law. Six years have elapsed and the enclosure remains. It is and at all times has been maintained. At the time of the construction of the enclosure the parties making it had color of title, and there was, therefore, no violation of the law with respect to the construction of the fence. The fence has been maintained for five years without a shadow of right or color of title, and yet the Government would be powerless in the premises, because at the time of the construction of the enclosure the parties had color of title to the land enclosed.

But the learned counsel for the defendant assert, that the proper procedure in such a case would be a civil action to recover possession of the land. Are we to infer that Congress did not consider these questions? Certainly not, this act was passed with a full knowledge of all civil remedies existing in favor of the United States, and was intended as a more effective way to clear the public domain.

We submit that a construction leading to such an absurdity carries with it its own conedmnation. As was said by the Supreme Court in Bates v. Bank, 100 U. S. 239:

"Any construction should be disregarded which leads to absurd consequences."

Or, as stated by Judge Cooley in his notes, 1 Blackstone p. 60:

> "The principle is, that we are not to suppose the legislature intended absurd consequences, and must therefore seek in their language for an intent which is reasonable."

"The language used", says Blackstone, "is always to be

"understood as having regard to the 'subject-matter,' and, "as to the effects and consequence, the rule is, that where "words bear either none, or a very absurd signification, if "literally understood, we must a little deviate from the re- "ceived sense of them.

"But lastly, the most universal and effectual way of dis- "covering the true meaning of the law, when the words are "dubious, is by considering the reason and spirit of it, or "the cause which moved the legislature to enact it."

1 Blackstone, pp. 60-61,

And what that is in this case, is clearly and distinctly enunciated in the title of the Act, viz:

"To prevent unlawful occupancy of public lands."

IV.

The learned counsel for the defendant assert that "a criminal case must be completely within all the words of the statute, and no criminal case can ever justly be brought within a statute, although it may be declared to be within a statute by fair *interpretation* of the *words;* 'if a case is fully within the mischief to be remedied, and is ever of the same class and within the words, construction will not be permitted to bring it within the same statute."

The learned Judge, in the Court below, said:

"Conceding, of course, the rule to be that penal laws are to be strictly construed, for such, in effect, is the doctrine defendant invokes, it is none the less true that in construing penal as well as other statutes the intention of the legislative power is to govern; and where the intention

can be gathered from the words used, no construction should prevail which will disregard the plain intent of the lawmakers. Said Chief Justice Marshall in United States v. Wilberger, 5 Wheaton, 76, in speaking of the maxim that penal laws are to be strictly construed: 'The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend.' "

In the United States v. Leacher, 134 U. S. 645, the Supreme Court speaking through Mr. Chief Justice Fuller, said:

"As construed on behalf of the defendant, there can be no comprehensive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, *yet the intention of the Legislature must govern in the construction* of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

Also in

United States v. Winn, 3 Sumn. 209, 211, quoted in U. S. v. Leacher, supra, Mr. Justice Story, said:

"It appears to me, that the proper course, in all these cases, is to search out and follow the true intent of the Legislature, and adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislautre."

To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law, (2d, ed), 282, quoted in U. S. v. Leacher, supra:

"The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or either it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parts plainly within their scope."

In United States v. Morris 39 U. S. 464, on page 475, Mr. Chief Justice Taney, speaking for the Court said:

"In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. *Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict* construction."

And in American Fur Company v. United States, 2 Peters, 358, the Court said:

"Even penal laws, which it is said should be strictly construed, *ought not to be construed so strictly as to defeat the obvious intention of the legislature.*"

So in United States v. Winn, Fed. Cases 16, 740, the Court said:

"In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promote in the fullest manner the apparent policy and objects of the legislature. * * * 'We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words, and the mischiefs, to be within the remedial influence of the statute. The most restricted sense, then, is not, as a matter of course, to be adopted as the true sense of the statute, unless it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment."

The case of the United States v. Churchill, 101 Fed. Rep. 443, cited by defendant, cannot stand against the cases cited in support of the opposite view.

In many instances the cases cited by the learned counsel for the defendant are in support of our contention, that is, that penal statutes are to be strictly construed, but not be such an extent as to deprive them of the purpose intended by Congress.

It is apparent, from the language used in the Act, that it was the intention of Congress to stop the occupancy of

the public lands, and to meet every situation that, it would seem, could possibly arise to annoy and harrass or impede the bona fide homeseeker of claimant under the land laws.

For the reasons herein set forth, the Motion in Arrest of Judgment was properly overruled.

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